

Summary: The defendants filed a motion for execution of judgment in which they sought the foreclosure of the plaintiff's membership interest in Eagle Eye Development, LLC. The Court denied the motion, finding that the North Dakota Limited Liability Company Act does not allow foreclosure as a remedy when enforcing a judgment against a judgment creditor's membership interest in a limited liability company.

Case Name: Roemmich v. Eagle Eye Development, LLC, et al.

Case Number: 1-04-cv-79

Docket Number: 173

Date Filed: 8/11/09

Nature of Suit: 160

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Bruce Roemmich,)	
)	
Plaintiff,)	ORDER DENYING MOTION FOR
)	EXECUTION OF JUDGMENT
vs.)	
)	
Eagle Eye Development, LLC and)	Case No. 1:04-cv-079
Leland Bertsch,)	
)	
Defendants.)	

Before the Court is the Defendants' "Third Motion for Execution of Judgment" filed on December 29, 2008. See Docket No. 143. The Plaintiff filed a response in opposition to the motion on February 13, 2009. See Docket No. 155. The Defendants filed a reply brief on March 2, 2009. See Docket No. 158. A hearing on the motion was held on July 30, 2009, in Bismarck, North Dakota. The Court denies the motion for the reasons set forth below.

I. BACKGROUND

The plaintiff, Bruce Roemmich, filed an action on April 13, 2004, against Eagle Eye Development, LLC, Leland Bertsch, Jane Bertsch, Janet Scholl, and Jon Wagner. In the complaint, Roemmich alleged four separate causes of action: (1) unfairly prejudicial conduct toward a member of a limited liability company; (2) breach of fiduciary duty to act in good faith toward another member; (3) breach of fiduciary duties to act in good faith by officers of a limited liability company; and (4) dissenters rights. See Docket No. 1. The statutory basis for each cause of action was Chapter 10-32 of the North Dakota Century Code which is commonly referred to as the North Dakota Limited Liability Company Act. A bench trial was conducted before Magistrate Judge Charles S. Miller, Jr. in December 2005.

Judge Miller entered Findings of Fact, Conclusions of Law, and Order on August 16, 2006. See Docket No. 87. On December 29, 2006, judgment was entered against Roemmich. See Docket No. 106. Roemmich's claims for monetary relief and for an accounting were dismissed with prejudice as to all of the defendants and all other claims against defendants Janet Scholl and Jon Wagner were dismissed with prejudice. Eagle Eye Development and Leland Bertsch were awarded a monetary judgment against Roemmich in the amount of \$71,188.62. On January 26, 2007, Roemmich appealed the judgment and numerous orders to the Eighth Circuit Court of Appeals. See Docket No. 107.

On February 23, 2007, defendants Eagle Eye Development, Leland Bertsch, Jane Bertsch, and Jon Wagner filed a motion for execution of judgment in which they moved the Court to execute on the December 29, 2006, judgment and to order the United States Marshal to satisfy the judgment out of Roemmich's personal property. See Docket No. 110. In support of the motion, the Defendants pointed to the fact that Rule 69 of the Federal Rules of Civil Procedure incorporates state

law with respect to the procedures to be followed upon execution of judgments in federal civil actions, and that North Dakota law generally allows enforcement of money judgments against the property of the judgment debtor under N.D.C.C. § 28-21-06. See Docket No. 111. On February 28, 2007, Judge Miller denied the motion for execution of judgment. See Docket No. 113. Judge Miller wrote:

[W]hile the writ the defendants seek is general, the proposed notice of levy accompanying the motion points to the plaintiff's membership interest in Eagle Eye as being the specific target of the writ. But, the problem here is that North Dakota's law regarding execution and levy contemplates a seizure and sale of property to satisfy the judgment amount, and there is a more specific North Dakota statute that appears to limit the remedies available to a judgment creditor to the issuance of a "charging order" when enforcing a money judgment against a membership interest in a limited liability company.

See Docket No. 113 (emphasis added). The more specific statute referred to by Judge Miller, N.D.C.C. § 10-32-34, reads as follows:

10-32-34. Rights of judgment creditor. On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge a member's or an assignee's financial rights with payment of the unsatisfied amount of the judgment with interest.

1. To the extent so charged, the judgment creditor has only the rights of an assignee of a member's financial rights under section 10-32-31.
2. This chapter does not deprive any member or assignee of financial rights of the benefit of any exemption laws applicable to the membership interest.
3. This section is the sole and exclusive remedy of a judgment creditor with respect to the judgment debtor's membership interest.

(emphasis added). Based on a review of N.D.C.C. § 10-32-34, Judge Miller found the following:

It may be that the plaintiff has other property within the District of North Dakota that is subject to execution. If so, and if the appropriate judgment creditors request the issuance of a writ of execution, it most likely will be issued. But, unless

the judgment creditors can make a showing that the court is wrong in terms of the remedies that are available, the court will not permit the United States Marshal to execute upon and sell the plaintiff's membership interest in Eagle Eye to satisfy the cost judgment in this case. See, e.g., Goldberg v. Winogradow, 2006 WL 3041979, *1-3; Brant v. Krilich, 835 N.E.2d 582, 592-593 (Ind. Ct. App. 2005); Herring v. Keasler, 563 S.E.2d 598 (N.C. Ct. App. 2002).

Based on the foregoing, the defendants' Motion for Execution of Judgment (Docket No. 110) is **DENIED WITHOUT PREJUDICE** to (1) the filing of [a] request for issuance of a charging order as provided for by N.D.C.C. § 10-32-34 or (2) a renewal by the proper judgment creditors of a request for a writ of execution that is either directed to other property or that is accompanied by a showing that the court is in error regarding the scope of remedies available under North Dakota law with respect to enforcement of the judgment as to the Eagle Eye membership interests.

See Docket No. 113 (emphasis added in first paragraph).

On March 5, 2007, defendants Eagle Eye Development, Leland Bertsch, Jane Bertsch, and Jon Wagner filed a "Second Motion for Execution of Judgment." See Docket No. 114. The Defendants moved for "an order which directs the execution and satisfaction of the judgment against the plaintiff's financial rights held in Eagle Eye Development, LLC." See Docket No. 115. On March 12, 2007, Roemmich filed a "Motion for Stay of Judgment Pending Appeal." See Docket No. 118. On March 21, 2007, Judge Miller granted the motion to stay and stayed the execution of the judgment pending a further order from the Court. See Docket No. 133.

On May 3, 2007, Judge Miller entered a "Special Charging Order Pending Appeal." See Docket No. 135. The purpose of the charging order was "to give Eagle Eye Development, LLC and Leland Bertsch a lien interest over the referenced financial rights, subject to the limitations imposed by N.D.C.C. § 10-32-34 and the specific terms of this order, to (1) secure payment of the above judgment and accrued interest and (2) to provide security for any additional costs and fees that may [be] taxed by the court as [a] result of the pending appeal." See Docket No. 135. On May 13, 2008,

the Eighth Circuit Court of Appeals affirmed the judgment. See Docket No. 136; Roemmich v. Eagle Eye Dev., LLC, 526 F.3d 343 (8th Cir. 2008).

On December 29, 2008, defendants Eagle Eye Development and Leland Bertsch filed a “Third Motion for Execution of Judgment.” See Docket No. 143. The Defendants move the Court to execute the judgment and to order the United States Marshal to satisfy the judgment out of Roemmich’s personal property. See Docket No. 143. The Defendants “respectfully request that the Court issue an order which directs the execution and satisfaction of the judgment against the plaintiff’s financial rights held in Eagle Eye Development, LLC.” See Docket No. 144. The Defendants seek foreclosure of Roemmich’s membership interest in Eagle Eye Development.

II. LEGAL DISCUSSION

N.D.C.C. § 10-32-34 grants a court the ability to charge a limited liability company member’s financial rights with payment of the unsatisfied amount of the judgment. N.D.C.C. § 10-32-34(3) makes clear that N.D.C.C. § 10-32-34 is the “sole and exclusive remedy of a judgment creditor with respect to the judgment debtor’s membership interest.” Judge Miller reviewed N.D.C.C. § 10-32-34 and determined that the statute “appears to limit the remedies available to a judgment creditor to the issuance of a ‘charging order’ when enforcing a money judgment against a membership interest in a limited liability company.” See Docket No. 113. Judge Miller continued: “unless the judgment creditors can make a showing that the court is wrong in terms of the remedies that are available, the court will not permit the United States Marshal to execute upon and sell the plaintiff’s membership interest in Eagle Eye to satisfy the cost judgment in this case.” See Docket No. 113.

The issue before the Court is whether the Defendants have made a sufficient showing in the third motion for execution of judgment that the remedies available to a judgment creditor under North Dakota law go beyond the issuance of a charging order when enforcing a money judgment against a judgment debtor's membership interest in a limited liability company. The Defendants contend that the North Dakota Limited Liability Company Act allows for the foreclosure of a judgment debtor's membership interest in a limited liability company. The Defendants contend that foreclosure of Roemmich's membership interest in Eagle Eye Development is proper and should be granted.

The Defendants argue that foreclosure of financial interests in partnerships and limited partnerships is allowed under North Dakota law. See N.D.C.C. §§ 45-17-04(2) and 45-10.2-64(2). The Defendants also argue that other states allow for the foreclosure of membership interests in limited liability companies. Although North Dakota's laws on partnerships allow foreclosure, the laws which govern limited partnerships no longer do.¹ Even though other states allow for the foreclosure of membership interests in limited liability companies, the issue before the Court is North Dakota's law on limited liability companies.

To support their contention that foreclosure should be allowed in the limited liability company context, the Defendants point to N.D.C.C. § 10-32-34(1) which reads: "To the extent so

¹ In support of the motion for execution of judgment, the Defendants argue that foreclosure of financial interests in limited partnerships is allowed by N.D.C.C. § 45-10.2-64. N.D.C.C. § 45-10.2-64(2) formerly read as follows: "A charging order constitutes a lien on the transferable interest of the judgment debtor. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee." (Emphasis added.) However, during the 2009 legislative session, the North Dakota Legislative Assembly amended that subsection to read: "A charging order constitutes a lien on the transferable interest of the judgment debtor." See H.B. 1298. N.D.C.C. § 45-10.2-64, as amended, took effect on July 1, 2009. See N.D.C.C. 1-02-42. Thus, effective July 1, 2009, it appears that foreclosure is no longer an allowed remedy for judgment creditors in limited partnerships.

charged, the judgment creditor has only the rights of an assignee of a member's financial rights under section 10-32-31." N.D.C.C. § 10-32-31(1) provides that "a member's financial rights are transferable in whole or in part." The Defendants argue that "because § 10-32-34 allows a judgment creditor to use a charging order to exercise the rights of an assignee to the extent provided in § 10-32-31, and § 10-32-31 allows an assignee to receive a transfer-in-whole of a member's financial rights, a charging order may require the transfer of a judgment debtor's entire financial interest in an LLC." See Docket No. 144. The Defendants also contend that the "sole and exclusive remedy" language of N.D.C.C. § 10-32-34 means that "the judgment creditor may only pursue the financial interests of the judgment debtor and may not pursue the LLC's assets directly." See Docket No. 144.

The Court disagrees with the Defendants' interpretation of N.D.C.C. § 10-32-31 as it relates to N.D.C.C. § 10-32-34. The Defendants fail to present any case law that supports the contention that N.D.C.C. § 10-32-31 creates a right to foreclosure under N.D.C.C. § 10-32-34. The fact that a member of a limited liability company may voluntarily transfer all of his financial rights to an assignee in normal business proceedings does not mean that a judgment creditor may receive all of a judgment debtor's financial rights through an involuntary foreclosure. Had the North Dakota Legislative Assembly intended to provide foreclosure rights for judgment creditors it would have done so explicitly in N.D.C.C. § 10-32-34, as it did in N.D.C.C. § 45-17-04(2) and N.D.C.C. § 45-10.2-64(2).

Alternatively, the Defendants contend that the North Dakota Limited Liability Company Act should be "linked" to North Dakota's laws on partnerships and limited partnerships as they pertain to charging orders and foreclosure. The Defendants argue that because North Dakota has adopted

the Revised Uniform Limited Partnership Act which provides for foreclosure, “it follows that foreclosure must be allowed in the LLC context.” See Docket No. 144.

The Defendants’ argument that the North Dakota Limited Liability Company Act should be “linked” to North Dakota’s laws on partnerships and limited partnerships also fails. The North Dakota Legislative Assembly has explicitly allowed foreclosure in partnerships and, until the most recent legislative session, allowed foreclosure in limited partnerships. However, the Legislative Assembly has declined to allow foreclosure under the North Dakota Limited Liability Company Act, despite the fact that the Uniform Limited Liability Company Act and the Revised Uniform Limited Liability Company Act both allow foreclosure. See Unif. Ltd. Liability Co. Act, § 504 and Unif. Ltd. Liability Co. Act 2006, § 503. The Legislative Assembly has had the opportunity to adopt uniform laws for limited liability companies but instead created the North Dakota Limited Liability Company Act which specifically varies from the uniform laws concerning foreclosure. Linking North Dakota’s laws would ignore the clear intention of the Legislative Assembly to not allow foreclosure when enforcing a judgment against a judgment debtor’s membership interest in a limited liability company.

It is clear that the North Dakota Limited Liability Company Act does not allow for foreclosure when enforcing a judgment against a judgment creditor’s membership interest in a limited liability company. N.D.C.C. § 10-32-34(3) clearly provides that a charging order is the “sole and exclusive remedy of a judgment creditor with respect to the judgment debtor’s membership interest.” The Court finds that the Defendants have failed to show that the available remedies under the North Dakota Limited Liability Company Act include foreclosure.

III. CONCLUSION

For the reasons set forth above, the Defendants' "Third Motion for Execution of Judgment"
(Docket No. 143) is **DENIED**.

IT IS SO ORDERED.

Dated this 11th day of August, 2009.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court